

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL
DISTRICT and COMMUNITY ROOTS
ACADEMY.

OAH Case No. 2017020910

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on February 17, 2017, naming Capistrano Unified School District and Community Roots Academy, Respondents. On February 27, 2017, Respondents served their written response to the complaint on Mother.

The matter was continued on March 30, 2017. Administrative Law Judge Cole Dalton heard this matter in San Juan Capistrano, California, on May 16, 17, 18, and 19, 2017.

Mother represented Student and attended each day of hearing.

Alefia Mithaiwala, Attorney at Law, represented Respondents Capistrano Unified School District and Community Roots Academy.¹ Allison Jacobs, Program Specialist and

¹ Community Roots Academy is a public charter school operating under the oversight of Capistrano Unified School District. Student's complaint, the PHC Order and the parties refer to Capistrano Unified School District and Community Roots Academy collectively as "District." This Decision will refer to Capistrano Unified School District and

Linda Koo, Director of Special Education and Student Services, attended various days of hearing on behalf of Respondents.

At the parties' request, the matter was continued until June 12, 2017, to permit the parties to file written closing arguments. Upon timely receipt of closing arguments on June 12, 2017, the record was closed and the matter was submitted for decision.

ISSUES²

1. Did Respondents deny Student a free appropriate public education by failing to assess his assistive technology needs between February 17, 2015, and the time Student enrolled at the University of California, Irvine's Child Development Center at the beginning of the 2016-2017 school year?

2. Did Respondents prevent Parent from meaningfully participating at the January 2016 individualized education program team meeting by predetermining Student's eligibility category, services, and/or placement, thereby denying Student a FAPE?

3. Did Respondents deny Student a FAPE by failing to conduct a (a) functional behavior analysis and (b) failing to develop a behavior intervention plan between February 17, 2015, and the end of the 2015-2016 school year?

4. Did Respondents deny Student a FAPE at the May 2016 IEP team meeting by:

Community Roots Academy collectively as "Respondents" except when specifically referring to one or to the other.

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- a. Failing to consider Dr. Passaro's independent educational evaluation report and recommendations with an open mind in determining Student's eligibility category, services, and/or placement;
 - b. Denying Parent meaningful participation in the meeting by predetermining Student's eligibility category, services, and/or placement;
 - c. Misrepresenting Student's progress on his goals;
 - d. Failing to offer appropriate services or an appropriate placement;
- and
- e. Failing to fully develop an IEP for Student at this meeting?
5. Did Respondents deny Student a FAPE by failing to implement Student's May 2016 IEP?
 6. Did Respondents deny Student a FAPE by failing to make him a clear placement offer for the 2016-2017 school year?

SUMMARY OF DECISION

Student was a highly intelligent and capable young man. Student used a computer or Chrome Book in the classroom to address his needs in written expression. He infrequently dictated notes using software on the Chrome Book to address his inability to take legible notes during lectures. Student failed to show that he had any other needs in the area of assistive technology that required assessment.

Student failed to demonstrate that Mother was denied meaningful parental participation at the January 2016 IEP team meeting. Mother notified Respondents of her concerns regarding Student and participated in the discussion regarding eligibility, placement, and services.

Respondents addressed Student's behavior needs through a classroom management system, using a token reward system and other strategies, which allowed Student to make progress in his general education placement. Respondents agreed to

conduct a formal behavior assessment in response to Student's independent assessment by Dr. Perry Passaro at the end of the 2015 – 2016 school year. However, Mother unilaterally placed Student in a private school before Respondents had an opportunity to complete the assessment. Accordingly, Student did not prove Respondents were required to conduct a functional behavior analysis and develop a behavior intervention plan.

Student did not prove Respondents denied him a FAPE at the May 2016 IEP team meeting. Respondents scheduled the meeting to review Student's independent educational evaluation by Dr. Passaro, who attended the meeting telephonically. Respondents incorporated several of Dr. Passaro's recommendations into the IEP in the form of accommodations, classroom supports, and goals. Ultimately Dr. Passaro and Respondents agreed on placement issues, though Mother continued to request placement at a non-certified private school. Student failed to demonstrate that Respondents did not review Dr. Passaro's evaluation with an open mind.

Student requested, and Respondents provided, Mother with a draft of the May 2016 IEP before the meeting. Mother attended the meeting with an attorney. Mother and counsel asked several questions, which were answered. Mother provided extensive input on a variety of issues. Student failed to prove Respondents predetermined eligibility category, services, and/or placement or denied Mother meaningful participation in the development of Student's IEP. Student failed to produce any evidence that Respondents misrepresented progress on goals or that Respondents failed to fully develop an IEP for Student.

Respondents conceded there was a brief delay in implementing the May 2016 IEP. Mother sent an email consenting to the IEP on May 16, 2016. But Respondents were not aware of the consent until June 13, 2016, due to an administrative error. However, Student did not show a material failure to implement the IEP resulting in a denial of

educational benefit during this time period. Only 18 days of school remained, many of them being shortened days with students involved in end of year activities, as opposed to regular educational activities.

Finally, Student failed to demonstrate any deficiency in the clarity of Respondents' offer for the 2016 – 2017 school year. The offer identified Student's eligibility, goals, accommodations, and services in such a way that any receiving school district would understand how to implement his program.

FACTUAL FINDINGS³

1. Student was diagnosed with attention deficit hyperactivity disorder at the age of five. Student was 12 years old at the time of hearing. He resided with his Mother within Capistrano Unified School District's boundaries at all relevant times.

2. Student began attending Capistrano schools in third grade, in September 2013. Throughout the statutory time period, Mother expressed concerns to Respondents regarding Student's ADHD and his grades in writing and language.

2014-2015 SCHOOL YEAR

3. Mother enrolled Student in Community Roots Academy, a charter school located within Capistrano's boundaries, in January 2014. Student excelled academically and qualified for the Gifted and Talented Education program in January 2014. He also received an award from the Johns Hopkins Center for Talented Youth in 2014.

³ On August 26, 2016, OAH issued a decision in consolidated case numbers 2016020288 and 2016010119. The consolidated cases involved the same parties and some of the same IEP's and time periods involved in this matter. Official notice of the prior Decision is taken pursuant to Evidence Code, section 451, subdivision (a) and Government Code, section 11515.

4. Capistrano provided special education services to students attending Community Roots pursuant to a memorandum of understanding. Capistrano conducted an initial assessment of Student in February 2014 at Mother's request. Respondents reviewed the initial assessment at an IEP team meeting in February 2014. Respondents did not find Student eligible for special education.

5. Heather Johnston taught fourth grade general education at Community Roots Academy. Student attended her class. Student did not consistently take his medication for ADHD. He had difficulty maintaining attention and focus, which affected organization skills, written expression, penmanship, and his ability to put his thoughts down on paper. Student generated little writing in class. His writing could be difficult to read. He required multiple prompts to attend to task. Student had difficulty organizing his workspace and often forgot to return homework. Student frequently talked to other students, disrupting their work, and required frequent prompting to remain on task. At the same time, Student expressed many areas of knowledge in an articulate and intelligent fashion. He could sit for tabletop tasks, answered questions when called on and had friends in school. He exhibited strength in mathematics, particularly computation and number sense.

6. Chrome Books were used in Ms. Johnston's class. Student used a computer or Chrome Book in the classroom for writing. He infrequently dictated his class lecture notes using software on the Chrome Book.

7. In late November 2014, Mother and Ms. Johnston referred Student for a second initial evaluation for special education eligibility. Both expressed concerns with Student's written expression, penmanship, distractibility, and disruption of the classroom environment.

February 19, 2015 Multidisciplinary Assessment

8. In January and February of 2015, Capistrano conducted assessments in psychoeducation, speech and language, and occupational therapy, resulting in a multidisciplinary assessment report dated February 19, 2015. The August 26, 2016 Decision found Capistrano's multidisciplinary assessment appropriate. This Decision considers the assessments to the extent they impact the issues of assistive technology and behavior. The multidisciplinary assessment did not include a functional behavior or assistive technology assessment.

Psychoeducational Assessment

9. Kari Brown, Capistrano school psychologist, held a master's degree in educational psychology, school counseling, and marriage and family child therapy. She has worked with pre-school through high school aged special education students, since 1998. She began working at Capistrano in 2001, the same year that she earned certification as a behavior intervention case manager. She had extensive training and experience conducting functional behavioral assessments and developing behavior intervention plans. Based upon her training, experience, and demeanor at hearing, she offered credible opinions and conclusions regarding Student's behavior needs.

10. As part of Student's assessment, Ms. Brown administered testing instruments in the areas of intellectual ability, behavior, social-emotional development and adaptive behavior. She reviewed Student's records, interviewed Mother and Ms. Johnston, and observed Student in his fourth grade classroom.

11. Ms. Johnston informed Ms. Brown that Student did not consistently take his medication to alleviate the effects of his ADHD. He demonstrated difficulty with attention and focus and rarely followed directions the first time asked. Further, Student lacked sufficient skills in organization, writing, and penmanship. His difficulty putting his thoughts on paper affected all areas of his academics.

12. Mother identified Student's areas of need in attention, focus, distractibility, impulsivity, organization, following one-step directions and writing. She described how Student often questioned what people said, needing to understand their reasoning. She also described tantrums, difficulty taking the perspective of others, and being argumentative. Student did not exhibit these traits at school.

13. Ms. Brown conducted three classroom observations. During each, she observed Student playing with his watch, tapping his fingers on the desk, talking to peers, rolling his pencil up and down his desk, or reading a book, rather than working on assignments. He demonstrated extreme impulsivity by blurting out answers to questions, looking around the room, fidgeting in his seat, and verbally interrupting Ms. Brown with questions and thoughts. Because of his distractibility, Ms. Brown divided the evaluation process into smaller sessions.

14. As a result of the evaluation process, as it relates to behavior and assistive technology, the multidisciplinary report recommended Student use an assistive technology device for all written assignments and tasks; use verbal responses instead of written answers to questions; receive consistent administration of his medication; and receive instruction on how to organize his belongings.

Occupational Therapy Assessment

15. Lindsey Morris conducted an occupational therapy assessment to determine whether Student had fine or gross motor deficits impacting his ability to write. She assessed for sensory processing issues, which could impact both handwriting and attention. Ms. Morris, a licensed occupational therapist since 2009, held a master's degree in occupational therapy. She had extensive training and experience in assessing students' fine motor coordination, handwriting, motor planning, and sensory processing. She began working for Capistrano in 2011, administering assessments and providing direct service occupational therapy to students. Her duties included collaborating with

IEP teams to develop sensory strategies and environmental modifications to help improve students' attention and participation in class.

16. Mother completed a parent input form for Ms. Morris on February 19, 2015. Mother identified areas of concern in writing including expressing thoughts on paper, basic grammar rules, sentence structure, spelling, letter formation, and fine motor skills. She identified behavior issues as including focus; ability to follow and follow through with one-step directions; excessive talking; needing to have the last word; difficulty accepting responsibility; and challenging requests made of him.

17. Ms. Johnston reported that Student's writing could be difficult to read; he had a messy desk; and forgot to bring his homework folder to school most of the time.

18. As a result of her assessment, Ms. Morris determined that Student did not have fine or gross motor deficits impeding his ability to write. He demonstrated the capacity to write legibly during the assessment. However, attention problems resulted in inconsistent classroom performance, fidgeting in his chair, failing to complete assignments with multiple steps, and exhibiting poor organization of school materials. Ms. Morris attributed Student's poor penmanship to the pressure of performing in class, given his ADHD.

19. Ms. Morris concluded that Student did not require direct occupational therapy services. Instead, she recommended several classroom accommodations: allowing Student to type longer assignments; using an assignment he wrote neatly as the standard for how his writing should look; pairing auditory instructions with visual supports; using a multisensory approach for teaching; having Student repeat back instructions; breaking assignments into smaller tasks; using a checklist for tasks; movement breaks; using a fidget item; rewarding for neat desk; and using an accordion folder for organization.

20. Ms. Morris did not recommend an assistive technology assessment because she knew Community Roots made Chrome Books available to students. As such, Student already had access to and used Chrome Books as a typing accommodation. Using the least restrictive environment approach, Ms. Morris first looked at having Student access his environment using the tools available in his classroom. In her view, an assistive technology assessment would not be required unless Student could not access his education using readily available technology.

FEBRUARY 20, 2015 IEP TEAM MEETING

21. Respondents reviewed the multidisciplinary assessment at an IEP team meeting held on February 20, 2015. Mother; Ms. Morris; speech and language pathologist Christine Lanners; Ms. Brown; Ingrid Beaty, administrator/general education teacher; and education specialists Lindsay Carucci and Myla Candelario attended the meeting.

22. The team discussed Student's superior intellectual ability, which all witnesses were quick to point out during the hearing. For example, Student performed in the superior range of intellectual ability for his age group on the general intellectual ability portion of the Woodcock-Johnson – cognition administered by Ms. Brown. At the same time, team members acknowledged Student's areas of need in written expression, organization, and off task behaviors associated with his ADHD and significantly impacted by inconsistent use of his medication.

23. Ms. Brown and Ms. Morris both observed Student engage in behaviors that disrupted classmates and kept Student off task. Nonetheless, Ms. Brown observed that Student could be redirected and his motivation reinforced when working for rewards. Further, Student produced grade level work in writing when provided with the accommodation of typing.

24. Respondents found Student eligible under the category of speech language impairment and offered speech services and a goal to address articulation.⁴ The evidence did not show that Student required a more restrictive behavior intervention plan. Respondents appropriately addressed Student's assistive technology needs by providing access to a Chrome Book. The evidence did not show that Student required an assistive technology assessment.

STUDENT'S SUBSEQUENT PROGRESS DURING THE 2014 – 2015 SCHOOL YEAR

25. After the February 20, 2015 IEP team meeting, Student remained in his general education classroom with Ms. Johnston. Ms. Johnston began implementing many of the accommodations identified in the multidisciplinary assessment, even though some of the accommodations she implemented were not included in the IEP. She provided Student with a graphic organizer and checklists. She used verbal prompts for redirection, shortened assignments, gave rewards for completed assignments, and checked for understanding by having Student repeat directions. She provided movement breaks, including sending Student to the office as a courier, to allow for longer breaks. Nonetheless, Student often reverted back to off task behaviors, including talking to other students, blurting out answers, and wandering around the classroom.

26. Student continued to use a Chrome Book for written assignments. However, Ms. Johnston also taught the class using printed forms, including fill in forms, which allowed students to follow along with her instruction. Student's writing on the forms tended to be illegible and incomplete.

⁴ The August 26, 2016 Decision found that Respondents should have determined Student qualified for special education and related services under the category of other health impaired because Student's behaviors at school and failure to make expected progress in written expression were due to Student's ADHD.

27. By the end of the 2014 – 2015 school year, when he finished fourth grade, Student continued to need significant support during writing assignments to put his thoughts down on paper and create an organized structure for his essays. Student failed to meet grade level standard expectations in writing opinion pieces and narratives. He did not meet grade level standards in planning, revising, and editing his writing, in punctuation conventions, or spelling. He continued to need to improve in the area of self-management.

2015 – 2016 SCHOOL YEAR

28. Student attended Ingrid Beaty's fifth grade class during the 2015 – 2016 school year. Ms. Beaty began teaching at Community Roots in 2011. She earned a bachelor of arts in liberal studies and a masters of science in education. She held a multiple subjects teaching credential; supplemental credentials in English language arts and social sciences; and an administrative services credential.

29. Ms. Beaty described Student as an extremely talkative, very bright, playful student, with a sense of humor. She provided direct, specific examples of projects Student worked on in class, his strengths, and weaknesses, lending credibility to her opinions and conclusions. She taught the class with Mrs. Igarashi, another general education teacher.

30. Ms. Beaty's classroom utilized a collaborative model. Students did project work in whole and small groups, defining a topic, research, writing, and presenting together. They discussed and defended their ideas and viewpoints and challenged each other. Student enjoyed this process because of his intelligence and sociable nature.

31. Though Student continued to require redirection, he seemed comfortable in class. He did not appear to be anxious. Student participated in feedback with peers during project work. He enjoyed sharing his work with friends using "Google Docs," which he independently accessed on a Chrome Book.

32. Student's fall 2015 report card showed that he continued to have needs in organization and study habits and required frequent check-ins and reminders to stay on task. He responded to positive feedback and the opportunity to work toward preferred activities in class. He frequently did not turn in homework, which affected his performance on in-class unit tests. His off task behaviors resulted in incomplete classroom assignments and impacted other students during independent work and class discussions. For these reasons, Ms. Beaty developed and used a Daily Progress Monitoring chart to assist Student to self-monitor his off-task behaviors.

33. Student made insufficient progress on U.S. States and Capitals, and writing informative/explanatory texts to examine a topic and clearly convey ideas. His report card demonstrated that he progressed toward or already met semester expectations in all other areas. He needed improvement in problem solving, self-management, and project management, only because he required reminders to stay on task.

JANUARY 6, 2016 IEP TEAM MEETING

34. Respondents held Student's annual IEP team meeting on January 6, 2016. Mother; Ms. Lanners; Ms. Candelario; education specialist Marni Fischer; administrator Jeremy Cavallaro; Ms. Morris; Ms. Brown; and Ms. Beaty attended the meeting.

35. Mother believed that Respondents predetermined the IEP by inviting team members unfamiliar with her son. However, Ms. Lanners, Ms. Brown, and Ms. Candelario attended Student's initial IEP meeting in February 2015 and all team members had some special knowledge regarding Student, programs available to meet his needs, or both.

36. The team discussed Student's strengths and areas of need. Mother expressed continued concerns about Student's writing and attention. Ms. Beaty described Student's progress in math, writing, and behavior, consistent with her notes in Student's fall report card. Student continued to struggle with written work, though his

writing had improved since the beginning of the school year. Work motivators included using the Chrome Book and being with his friends in class.

37. Mother sought a change in eligibility to specific learning disability due to a discrepancy in intellectual ability and achievement in the area of written expression. The team explained that Student's needs would be addressed irrespective of the eligibility category. They explained that, while a discrepancy existed between ability and achievement, Student performed in the average range in written expression. Mother believed Respondents to be dismissive of her concerns. However, the evidence showed that Respondents simply did not agree with her.

38 The team added a goal for written expression, as Student did not meet grade level when writing a single paragraph story. The goal addressed Student's need to generate consistent writing skills at grade level, by having him write a two paragraph narrative on an informative topic with a clear topic, correctly formatted paragraphs that link sequenced events, using transition words, with a connected conclusion.

39. Mother believed that Respondents did not want to remediate Student's deficits in penmanship because they did not offer occupational therapy services and did not develop a goal in this area. However, Student did not have fine motor deficits and could write neatly when he took his time. Further, fifth grade standards did not include a penmanship standard. Student produced no evidence to establish that penmanship should have been addressed as part of his January 2016 IEP.

40. Ms. Morris made recommendations for program modifications, based upon her prior assessment and observations of Student in the classroom. She suggested accommodations for typing assignments; dictating ideas to a scribe, then copying them; incorporating movement breaks into his school day; access to classroom notes when needed; repeating back instructions; breaking assignments into smaller tasks with time deadlines for each chunk; and collaborating to plan "how to" complete assignments with

a checklist of steps. The team incorporated the accommodations into the IEP. Additionally, the team added program support consisting of collaboration for teachers and staff with an occupational therapist for additional strategies to help with Student's writing and work completion.

41. Mother participated in the meeting by attending, providing input, and asking questions. She asked for an assistive technology assessment. The team denied the request because Student did not have fine motor issues and could access his education with classroom accommodations.

42. At hearing, Ms. Morris agreed that Student did not require a specific piece of equipment or particular software to access his education. He simply required access to a computer or laptop. The IEP specified this access through Student's accommodations page.

43 The team marked "no" in the behavior check mark section, reflecting that Student's behavior did not impede his learning or that of others. The team did not develop behavior goals or a behavior plan. However, based upon assessments and Student's reported progress in Ms. Beaty's class, Student continued to exhibit behavior deficits from his ADHD, which affected his ability to stay on task and complete work. His off-task behaviors of talking with classmates, blurting out answers, wandering around the class, also interfered with the learning of others.

44. Program specialist, Ms. Candelario, described the team's discussion of placement and services, which ranged from pull-out for specialized academic instruction to providing supports in general education without any special education services. Ms. Candelario held a bachelor of arts in political science, a master of arts in special education, and a doctorate in education-learning technologies. She held an education specialist credential for mild/moderate disabilities. She began working as a special

education teacher and education specialist for Capistrano in 2012. She became a program specialist for Capistrano in August 2016.

45. At hearing, Mother disputed that the team discussed placement options during the IEP. However, the IEP notes corroborated Ms. Candalario's testimony; the team considered general education, related services, and specialized academic instruction. Ultimately, the team agreed on a pull-out model because Student could focus better in a smaller environment.

46. The January 6, 2016 IEP offered Student general education placement with pull-out specialized academic instruction for 45 minutes, three times per week; and speech and language for 30 minutes, one time per week.

INDEPENDENT EDUCATIONAL EVALUATION

47. Mother obtained an independent educational evaluation by Dr. Perry Passaro, which began in February 2016. Dr. Passaro interviewed Mother and Ms. Beaty; observed Student at school; reviewed Student's educational records; obtained inventories and rating scales from Mother, Student and Ms. Beaty; and conducted standardized tests in the areas of cognition; communication; language; academics; social-emotional functioning; and behavior. Respondents did not dispute the validity of Dr. Passaro's testing results but disagreed with some of his conclusions.

48. Dr. Passaro observed Student in his class and at recess for 66 minutes on February 8, 2016. Student sat at a table at the front of the class with five other students. Ms. Beaty taught the class of approximately 30 students, which also had two student teachers and an aide working with another student. In this environment, Student exhibited several instances of off-task behavior. Even when on task, Student talked to himself or other students who were trying to work. When redirected by Ms. Beaty, Student returned to task momentarily. Dr. Passaro observed Student using his laptop for a writing assignment and obtaining headphones to use dictation software on the laptop.

At recess, he talked to and played with classmates. He did not exhibit maladaptive behaviors.

49. During her interview by Dr. Passaro, Ms. Beaty provided input consistent with his observations. She described Student as talkative and easily distractible. Student often failed to turn in homework or complete classwork. He became less impulsive when taking his ADHD medication.

50. As a result of his testing and observations, Dr. Passaro made recommendations to address Student's needs in written expression. He suggested that Student learn to combine sentences using transitional words; to use compound-complex sentences; increase writing fluency through practice, editing spelling and grammar; and use computer technology to make writing easier and more motivating. Dr. Passaro recommended neither specific software, nor an assistive technology assessment.

51. Dr. Passaro made several accommodation suggestions, including chunking of assignments; having Student restate directions; demonstrating organization strategies; reinforce on task behavior and attention; preferential seating; and using demonstrations to teach. These recommendations were already being implemented by Ms. Beaty as accommodations in Student's January 6, 2016 IEP.

52. Dr. Passaro suggested a behavior support plan to increase on task behavior as the next step in a continuum of services. Though he also thought Student might instead require a more restrictive placement with intensive intervention to teach self-monitoring and self-management. He recommended the Child Development School located on the campus of University of California, Irvine. The school used methodologies designed for students with ADHD. Student provided Respondents with Dr. Passaro's March 25, 2016 report on April 1, 2016.

STUDENT'S PROGRESS IN SPECIALIZED ACADEMIC INSTRUCTION

53. Ms. Candelario became Student's specialized academic instruction teacher after the January 6, 2016 IEP. She saw Student three times per week in 45-minute sessions, utilizing small group and one-on-one instruction for the remainder of the 2015 – 2016 school year.

54. Ms. Candelario worked with Student in a group of two to three students in fifth grade. She formed smaller groups to work on reading, writing, and math, depending on each student's need. Her sessions typically began with a grammar lesson that took 10 minutes to review punctuation, sentence structure, transitional words, vocabulary, paragraph formation, apostrophes. After that, students accessed their Google accounts to apply what Ms. Candelario taught through review of a current assignment. She used open dialogue to discuss grammar and other needs. She then started a writing lesson, modeling sentence starters. She used her computer and a projector to write and display instruction for the small group. She went through the writing process sentence by sentence, from topic statement to conclusion. She would look at the purpose of the assignment, teacher directions, and reviewed student research to provide examples of what they could incorporate into their writing. This systematic teaching method paralleled Dr. Passaro's recommendations for addressing Student's needs in written expression.

MAY 10, 2016 IEP TEAM MEETING

55. On May 6, 2016, Student's attorney requested draft goals and progress reporting be provided to counsel and Mother no later than May 9, 2016, in preparation for the IEP to review Dr. Passaro's assessment. Respondents complied with the request.

56. On May 10, 2016, Respondents held an addendum IEP team meeting. Mother; Student's attorney Lauren-Ashley Caron; Ms. Lanners; Ms. Brown; Ms.

Candelario; Mr. Cavallaro; Ms. Ingrid; program specialist Cheri Bene; and administrator Marni Fischer attended the meeting in person. Dr. Passaro attended by telephone.

57. The team reviewed Student's progress on old goals and discussed new goals. Mother and her attorney asked multiple questions. Mother provided input on Student's present levels of performance in homework completion and organization. Dr. Passaro, Mother, and Respondents ultimately agreed, without modification, to new goals drafted by Ms. Candelario, Ms. Lanners, and Ms. Beaty.

58. Based upon work samples and observational data provided by Ms. Candelario, Student demonstrated the ability to write a three-paragraph essay at grade level, in one trial. One trial consisted of a writing project lasting over a period of weeks. Ms. Candelario updated Student's goal to match sixth grade standards, requiring Student to write a three-paragraph essay, over five trials.

59. Ms. Beaty described Student's gains in explaining math calculations and in written expression. He progressed in the area of organizing his writing projects from choosing a topic to writing a story. While he started the school year writing sentences, he finished it writing longer paragraphs. However, his penmanship continued to be inconsistent.

60. Ms. Beaty described an increase in Student's off-task behaviors over the few weeks prior to the IEP team meeting. Without medication, Student would be off task for 10 to 20 minutes at a time. On medication, Student required five to six prompts to return to task.

61. The team reviewed two new goals to address study habits, including completing and turning in homework and maintaining an organized workspace. Three new goals addressed Student's ability to regulate his behavior with fewer prompts in the areas of following directions, completing class assignments, and staying on task. Student's speech goal carried over from the January 2016 IEP.

62. Dr. Passaro presented his assessment findings and recommendations. Dr. Passaro held licenses as both a psychologist and educational psychologist, and was a diplomate of the Academy of Cognitive Therapy. He described the importance of having a high quality, intensive program in place for Student's transition to middle school. He recommended therapy to help Student learn self-management and address anxiety seen by Parents at home. However, the team did not see anxiety at school that interfered with Student's ability to access his education. Dr. Passaro recommended development of a behavior support plan after a functional behavior assessment to address behaviors impeding Student's learning and that of others. The team agreed to conduct the assessment to determine whether a behavior support plan would be needed with the new interventions being offered.

63. The team thoroughly discussed Dr. Passaro's recommendation for placement at the Child Development School at UCI. The team discussed Child Development School's lack of certification as a nonpublic school. Respondents informed Mother that they could not fund placement at a nonpublic school that lacked state certification.

64. Capistrano described its Therapeutic Behavior Intervention Class because it provided similar interventions to Child Development School, but in a less restrictive environment where Student could have access to typically developing peers. Capistrano's program provided the cognitive behavioral therapy component recommended by Dr. Passaro, along with a smaller class size and ongoing intensive behavior intervention. Respondents invited Mother to observe the class to become familiar with Respondent's placement options. Mother opined that having Student attend a program separate from his peers would increase his anxiety. However, she expressed no such concern regarding the program housed at UCI.

65. Ultimately, the team, including Respondents and Dr. Passaro, agreed that a therapeutic placement would be too restrictive because Respondents could provide further intervention to Student in a general education setting. Consistent with his assessment report, Dr. Passaro recommended that Respondents first provide additional intervention in general education, then monitor, and modify Student's program as needed, before considering moving him to a more restrictive setting. Mother did not voice disagreement at the time.

66. Respondents offered general education with specialized academic instruction for 260 minutes per week, during English language arts, using a push-in model. Respondents based the change to a push-in model on Mother's input that Student did not want to be in a separate classroom from his peers. Additionally, Student functioned at a higher level than others receiving specialized academic instruction in the pull-out setting.

67. The team also discussed the decrease in specialized academic instruction from 300 minutes per week, which Student received during the fifth grade year. Sixth grade classes had shorter 52-minute class periods, which aligned with the new offer. Respondents commonly had success with modified specialized academic instruction that aligned with middle school instructional time and could modify the time, if needed, at an addendum IEP. Further, Student had only one academic goal being addressed. Mother opined that one-on-one instruction would be better for Student, in spite of her earlier assertion that Student should not be separated from typically developing peers.

68. Mother had no additional questions of Dr. Passaro. After he left the meeting, Mother pushed the team to change eligibility to specific learning disability and to complete the functional behavior assessment and behavior plan in the remaining few weeks before the summer break. Respondents explained the process of assessing for

behavior, data collection, and analysis, and the timing of the assessment, which required several weeks to complete.

69. The team changed Student's eligibility to other health impairment due to attention deficit hyperactivity disorder, maintaining speech language impairment as a secondary disability.

70. Throughout the meeting, Mother made her opinions known, asked questions, engaged in lengthy conversations about services, accommodations, eligibility, placement, and the functional behavior assessment. Respondents checked in with Mother several times to see whether she had more questions and answered any she asked. Mother's attorney asked questions of the team and received input.

ASSISTIVE TECHNOLOGY

71. At hearing, Ms. Morris described Respondents' procedure on assistive technology assessments. If a student required access to specialized software, an augmentative communication device, or other specialized devices to help with physical limitations, Respondents obtained an assessment. If a student required specialized technology, such as access to a computer, Ms. Morris made recommendations. She worked with assistive technology specialists in the past and had a working knowledge of whether students required assistive technology.

72. Student infrequently used voice to text software on his Chrome Book. Dr. Passaro agreed that Student should have access to typing and voice to text software to access his education. He did not recommend an assistive technology assessment. Mother did not request such an assessment at the May 2016 IEP meeting.

73. At hearing, Mother argued that Student required access to Don Johnston software for word prediction, speech-to-text, and draft building and an Echo Smart Pen in order to meet his needs in written expression. However, Student proffered no expert

opinion to demonstrate a need for this particular software or hardware, particularly in light of the accommodations already being accessed by Student.

IMPLEMENTATION ISSUES

74. On May 15, 2016, Mother emailed Capistrano a signed assessment plan for the functional behavior assessment. Mother again asked that it be completed before the end of the school year, while at the same time acknowledging that Ms. Brown already explained why that could not be accomplished.

75. Late in the evening on May 16, 2016, Mother sent an email to Ms. Brown that contained no message, but attached a signed consent page for the May 10, 2016 IEP. Ms. Brown did not notice the attachment on the email. At hearing, she credibly explained that Mother typically sent long emails and, since this email had no message, she did not scroll down and notice the attachment. While explaining her error, she seemed genuinely contrite that she missed the attachment. Mother sent another copy of the consent page, which Capistrano marked "received" on June 13, 2016. Normally, Mother sent those types of documents to Ms. Candelario, Student's case carrier.

76. On May 18, 2016, Mother sent Ms. Brown a request to hold an IEP team meeting to address unspecified concerns with Student's May 10, 2016 IEP. On May 19, 2016, Ms. Brown responded and forwarded the email to Student's case carrier, Ms. Candelario.

77. On May 26, 2016, Ms. Candelario emailed Mother three available dates for an IEP team meeting. On May 27, 2016, Ms. Candelario sent notices for the reserved IEP dates.

78. On June 1, 2016, Mother responded to Ms. Candelario concerned that Student required immediate, intensive intervention and gave notice of her intent to unilaterally privately place Student at a nonpublic school or agency, at public expense.

79. On June 2, 2016, Mother sent an email to Capistrano requesting an independent occupational therapy evaluation. Sara Young, Capistrano's Director, Informal Dispute Resolution, sent prior written notice on June 6, 2016, denying the request to fund both the occupational therapy evaluation and a private placement. The notice reflected District's then current understanding that Mother had not consented to the May 10, 2016 IEP.

80. Late in the evening on June 12, 2016, Mother again emailed Ms. Young, advising her that she consented to services through an email attachment to Ms. Brown. She purported to attach that email to her June 12, 2016 response, as well. However, neither the attachment nor the time stamp on the forwarded email looked the same as the original email purportedly sent to Ms. Brown on May 16, 2016.

81. On June 13, 2016, Capistrano incorporated Mother's consent into the IEP. Mother disagreed with eligibility, stating that Student should be eligible under specific learning disability in written expression; that his goals were insufficient; that his present levels of performance were not accurate; and that Student's emotional needs were not being addressed. Mother requested that the IEP team consider UCI Child Development School as an appropriate placement for Student. Student completed the 2015 – 2016 school year at Community Roots. He attended the UCI program for the 2016 – 2017 school year, which began on September 9, 2016.

82. Student's specialized academic instruction ended June 10, 2016, in line with Capistrano's instructional school year, and consistent with the end date noted on the May 2016 IEP. Given that Mother sent consent late on May 16, 2016, Student would have started receiving increased specialized academic instruction on May 18, 2016. There were 16 school days between May 18, 2016 and June 10, 2016, during which Student could have received up to 16 hours of specialized academic instruction if Respondents were aware of Mother's consent to the May 2016 IEP. Instead,

Respondents continued to implement the January 2016 IEP, giving Student seven hours of specialized academic instruction. Nonetheless, Student made progress in his second semester, received passing grades, and showed improvement in English language arts; writing, listening, and speaking; problem solving; and project management. He continued to need improvement in self-management.

CHILD DEVELOPMENT SCHOOL

83. Dr. Sabrina Schuck, Executive Director of the Child Development School, held a bachelor and master's degree in psychology and a doctorate in education. Dr. Schuck developed an impressive body of published research articles on attention deficit disorder, including treatment regimens for ADHD and the impact of ADHD on academic performance, behavior, and socialization. She demonstrated a depth of knowledge and excitement about creating the school based behavioral health program within UCI's School of Medicine, Division of Pediatrics.

84. The program mimicked a regular school but implemented extensively modified work for children with ADHD and other functional impairments, including learning disorders, anxiety disorders, and autism spectrum disorders. The middle school taught mostly children on the autism spectrum who tended to present with cognitive rigidity, and executive function and organization skill deficits.

85. The school implemented a universal token system for productivity, compliance, and relationships. All children received the same program. Students attended on a closed campus; received ongoing monitoring and modification of target behaviors and reinforcers; and obtained social skills training. The school required parents to attend ongoing training to bolster student success across environments.

86. Dr. Schuck reviewed Dr. Passaro's report as part of Student's school records. Her analysis supported a finding that Dr. Passaro administered comprehensive assessments of Student and provided an accurate description of Student's intellectual

potential and cognitive performance deficits. She described Student as being extremely easily taken off task and impulsive. She did not believe that Dr. Passaro should have conducted a functional behavior assessment because observing Student's behavior in class provided enough information to determine the function of behaviors and develop supports.

87. Dr. Schuck emphasized that observing a student's behavior provided more input than a formal functional behavior assessment, because no assessment tool works as well as trial and error. She described the Child Development School as a constant assessment of functional behavior.

88. Dr. Schuck described Capistrano's Therapeutic Behavior Intervention Class as being developed in a model similar to classes at her school. The main difference between the two programs consisted of Capistrano's class being on an open campus.

89. Rachel Newman, Student's teacher at Child Development School, held a bachelor of arts in communication and a master of arts in screen writing. She also held a multiple subjects teaching credential, which she needed two classes to clear. Ms. Newman described Student as being bright, inquisitive, and curious, with high abstract reasoning skills. She observed the gap between Student's verbal expression and written production.

90. She provided Student with accommodations that mirrored Respondents' program. Student had access to a Chrome Book for typing. His writing assignments were broken into smaller chunks and he used graphic organizers to help develop sentence structure. Student infrequently used a Smart Pen to record auditory lectures. Typically, Ms. Newman used multi-modality teaching, which included visual or tactile input. She provided typed notes with blank spaces that students used to follow lectures. Student performed at the top of his class. Ms. Newman described the school as being an appropriate placement for Student, based upon his progress.

91. Patricia Ramsey, social skills instructor at Child Development School, described Student's social-emotional skills. Student had difficulty when he did not feel heard, felt that something unfair happened, or when asked to do a non-preferred task. However, in the UCI program, Student responded to intervention by crying for hours at a time, at least once per week, resulting in missed instruction. Ms. Ramsey believed a referral for assistive technology would be warranted for Student, since typing helped him so much in class by increasing his productivity and organization. She did not describe any assistive technology devices she thought might be helpful to Student, other than what he already used in class.

RECORDS REQUESTS

92. On June 9, 2016, Mother sent a request for student records to Capistrano. Linda Koo, Capistrano's Special Education Legal Specialist, responded on June 16, 2016, by sending an electronic copy of the records. On June 17, 2016, Mother requested Student's original records and service logs from specialized academic instruction. On June 17, 2016, Ms. Koo responded that classwork and homework had previously been provided to Mother as part of Student's regular school program and that Ms. Candelario did not keep service logs for any student. Ms. Candelario tracked Student's specialized academic instruction hours by using his regular attendance records, which corresponded to dates noted on Student's work samples.

93. Because Mother continued to dispute the existence of additional educational records, on June 22, 2016, Capistrano offered Mother three dates and time ranges during which she could access Student's records in their special education office. Mother opted not to review the records. Mother believed that Respondents interfered with her ability to participate in the development of her son's IEP's by failing to produce his educational records. However, Mother repeated record requests frequently and on

each occasion, Capistrano either produced records or offered opportunities for Mother to review original records in person.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁶ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their Parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the Parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of Parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational

benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'..." (*Endrew F. v. Douglas School Dist. RE-1* (2017) 137 S.Ct. 988, 1000 (*Endrew*)). The Supreme Court in *Endrew* stated that school districts must "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.)

4. The IDEA affords Parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).)

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Thus, Student had the burden of proof on the issues raised in the complaint.

ISSUES 1 AND 3: FAILURE TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY

6. Student contends Respondents failed to conduct assistive technology and functional behavior assessments from February 17, 2015 through the time he enrolled in University of California, Irvine's Child Development School, in September 2016. Respondents contend that Student did not require an assistive technology assessment in order to obtain access to assistive technology devices as an accommodation in his IEP's. Further, Respondents contend that Student's behaviors did not warrant a functional behavior assessment throughout the 2015 – 2016 school year. Respondents agreed to conduct a functional behavior assessment after reviewing Dr. Passaro's report at the May 10, 2016 IEP team meeting.

Legal Authority

7. In California, a district assessing a student's eligibility for special education must use tests and other tools tailored to assess specific areas of educational need, and must ensure that a child is assessed in all areas related to a suspected disability. (Ed. Code, § 56320, subds. (c), (f); see also, 20 U.S.C. § 1414(b)(3)(B).)

Assistive Technology

8. When developing a pupil's IEP, the IEP team shall consider whether the child requires assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 CFR 300.324 (a)(2)(v); Ed. Code, § 56341.1, subd. (a)(4)) An "assistive technology device" is defined as "any item, piece of equipment or product system [other than a surgically implanted device] . . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs." (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) Assistive technology devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. (34 C. F. R. § 300.105.)

9. There is no express requirement that a school district perform an assistive technology evaluation. A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1)(ii).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6).) Therefore, in the proper circumstance, a school district may be required to perform an evaluation of a child's need for assistive technology devices or services.

Behavior

10. The IEP team shall, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Cal. Educ. Code, § 56521.2, subd. (b).) The IEP must include a statement of the "special education, related services, supplementary aids and services, and program modifications or supports" that will be provided to the child. (20 United States Code 1414(d)(1)(A)(i)(IV).) There are no unique requirements regarding the documentation of any positive behavioral interventions and supports and other strategies that are identified in state or federal law. Further, there is no requirement that positive behavioral interventions and supports for a child whose behavior impedes the child's learning or that of others be based on a functional behavioral assessment. (34 C.F.R. 300.324.(a)(2); 71 Federal Register 46683, August 14, 2006.)

11. An IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.) An IEP is a "snapshot" and must be evaluated in

terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

Procedural Violations

12. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) The determination of what tests are required is made based on information known at the time. (*See Vasherese v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subs. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

13. A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939.)

Analysis and Conclusions

ASSISTIVE TECHNOLOGY ASSESSMENT

14. Student presented no witness with expertise in assistive technology to demonstrate that Student required an assessment in this area. Student's independent assessor, Dr. Passaro, did not recommend an assistive technology assessment. Rather, he supported Respondents' use of accommodations, such as access to a computer for typing longer writing assignments and dictation software, which Student already used successfully.

15. Respondents' February 2015 psychoeducational evaluation, which included an occupational therapy evaluation, produced relevant functional and developmental information about Student, which assisted in determining the content of Student's subsequent IEP's. Specifically, the assessments showed that Student did not have fine motor deficits, which required access to specialized equipment or may have indicated the need for further evaluation through an assistive technology assessment. Rather, the assessments showed, through testing, observation, and record review, that Student accessed his education using a computer or laptop for writing longer assignments, and dictation software for recording longer lectures.

16. Student's ability to complete longer written assignments continued to develop throughout the relevant time period, resulting in grade level written work before the end of the 2015 – 2016 school year. Further, Child Development School providers neither conducted nor recommended an assistive technology assessment as a means to determine how Student could access his education once he enrolled. Rather, they continued to provide Student with access to a laptop or computer for longer writing assignments and use of dictation software for longer lectures. Ms. Ramsey's suggestion at hearing that an assistive technology assessment would be warranted was not persuasive on this issue for several reasons. First, she had no formal training or

experience in either occupational therapy or assistive technology. Second, the evidence showed that she made no such recommendation prior to the hearing. Third, she did not identify any areas of need not already being addressed by accommodations being used in Student's class.

17. Student failed to show that Respondents needed additional functional and developmental information about him to assist in determining the content of his IEP's. He did not show that he had assistive technology needs that Respondents failed to address.

18. District provided Student with appropriate supplementary aids and services to allow him to access his education and make progress appropriate in light of his circumstances. For these reasons, Student did not demonstrate by a preponderance of the evidence that he required an assistive technology assessment at any time during the statutory period.

FUNCTIONAL BEHAVIOR ASSESSMENT AND BEHAVIOR INTERVENTION PLAN

19. Student failed to demonstrate that he required a functional behavior assessment at any time prior to the IEP team meeting of May 10, 2016. Respondents agreed to the assessment but could not complete the assessment, as Mother notified them, three weeks later, of Student's unilateral private placement at Child Development School.

20. During the statutory time period, Student demonstrated behaviors that impeded his learning and that of others. His behaviors resulted from his ADHD and heightened when he did not take his medication. Student's teachers, Respondents' assessors, and Dr. Passaro each described the same off-task behaviors, which included excessive talking, walking around the classroom, blurting out answers, and fidgeting with his pencil.

21. Student's teachers implemented classroom accommodations to address the behaviors and added goals in the May 10, 2016 IEP to address homework completion, organization, following directions, remaining on-task, and completion of in-class assignments. However, Student did not demonstrate that he required a functional behavior assessment prior to Dr. Passaro's recommendation in his assessment reported at the May 10, 2016 IEP team meeting. At hearing, Respondents disputed the necessity of the assessment during any time period. They agreed to perform the assessment solely based upon Dr. Passaro's input. The evidence demonstrated that Respondents already identified Student's target behaviors, developed accommodations to address those behaviors and eventually developed goals to track progress on the behaviors.

22. Although IEP's are generally viewed as a snapshot, and not in hindsight per the decision in *Adams, supra*, later acquired information is properly considered under the "snapshot rule" for the limited purpose of determining the reasonableness of an IEP offer. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F. 3d 999, 1006 ("[A]dditional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date.")) Here, Student's program at Child Development School shed light on the issue of whether District's earlier failure to conduct a functional behavior assessment resulted in the denial of a FAPE.

23. Significantly, Dr. Schuck did not recommend a behavior assessment for Student and found that observing his classroom performance revealed more information than a formal assessment in the area of behavior. Dr. Schuck demonstrated significant training, experience, and insight in the area of behavior. She testified candidly and compassionately, adding credibility to her opinions and conclusions. Dr. Schuck referred to Student's program at Child Development School as being an ongoing behavior assessment. The School did not identify any target behaviors not already

addressed by Respondents. The program modifications being implemented by the School mirrored that of Respondents' program, specifically, chunking of information, providing redirection, working towards time on preferred activities, and allowing movement breaks.

24. Student proffered no evidence to show that a functional behavior assessment would have identified additional target behaviors or suggested different goals to address the behaviors already identified. The evidence did not support a finding that Respondents should have conducted a functional behavior assessment prior to Dr. Passaro's recommendation. Further, Student did not demonstrate that he required development of a formal behavior intervention plan. Respondents used positive behavioral interventions, supports and other strategies to address Student's behaviors impeding learning, during all relevant time periods. As such, Student failed to establish, by a preponderance of the evidence, that Respondents failure to conduct a functional behavior assessment or develop a behavior plan denied him a FAPE.

ISSUES 2 AND 4(B): PARENTAL PARTICIPATION

25. Student contends that Respondents denied meaningful parental participation at his January 6, 2016 and May 10, 2016 IEP team meetings, in that Respondents predetermined Student's eligibility category, services, and/or placement. Respondents argued it considered parental input at every stage of the IEP process, and developed Student's IEP's with an open mind.

Legal Authority

PARENTAL PARTICIPATION

26. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is "[a]mong the most important procedural

safeguards" in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

27. Federal regulations require school districts to ensure parental participation in the IEP process. (34 C.F.R. § 300.322.) Further, although the federal regulations do not encourage the preparation of a draft IEP, it is noted in the comments to the proposed implementing regulations for the 2005 version of the IDEA, that if a draft IEP is prepared prior to the IEP team meeting, it should be provided to the parents prior to the date of the IEP team meeting to help the parents be prepared to fully participate. (71 Fed.Reg. 46678 (2006).)

28. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum, and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and, when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

29. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to

discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

30. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Board of Educ.* (6th Cir.2004) 392 F.3d 840, 858.) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.) However, a school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*See, N.R. v. San Ramon Valley Unified School. Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323.)

ANALYSIS AND CONCLUSIONS

31. Mother attended the January 6, 2016 and May 10, 2016 IEP team meetings, asked questions, provided input, expressed disagreement and requested changes in Respondents' programs. Student failed to demonstrate a denial of parental participation at either meeting.

32. During the January meeting, Mother requested a change in Student's eligibility to specific learning disability, requested an assistive technology assessment, and expressed concerns in Student's writing, attention, and penmanship. Respondents demonstrated that they discussed prior assessments as those related to Student's eligibility, with an open mind. They assured Mother that Student's needs would be addressed in the IEP, irrespective of eligibility category. Mother's chief concerns continued to be writing, penmanship, and attention.

33. Respondents addressed Student's writing needs by developing a goal in written expression. Respondents addressed penmanship by conducting the occupational

therapy assessment, which showed no deficits in fine motor skills. Student's attention affected his ability to write neatly. Respondents addressed both attention and penmanship deficits through a series of accommodations, which allowed Student to write assignments using a computer or laptop, dictate notes to a scribe, and use voice-recording software in the classroom.

34. Respondents answered Mother's request for an assistive technology assessment by denying the request and explaining the reasons for the denial. In short, though Mother maintained several areas of disagreement with Respondents' programs, the evidence showed that she actively participated in their development.

35. Mother attended the May IEP team meeting with an attorney and an independent assessor. Respondents provided draft goals to Mother and her attorney before the meeting. Respondents' incorporated the majority of Dr. Passaro's recommendations in the draft IEP.

36. Mother asked several questions during the IEP team meeting. Notably, she questioned eligibility only after agreeing to excuse Dr. Passaro from the meeting. Nonetheless, the team engaged in a lengthy and thorough discussion of eligibility, which changed to other health impairment, but did not include specific learning disability.

37. The team extensively considered placement options with Dr. Passaro. Though the team would not agree to a change in placement to Child Development School, it did consider options on the continuum of placements, including the Therapeutic Behavior Intervention Class, which mirrored Mother's preferred placement. Ultimately, Dr. Passaro agreed with Respondents' offer of general education placement with specialized academic instruction and goals to address academic and behavioral needs, as this placement could meet Student's needs in the least restrictive environment.

38. Mother actively participated in every step of the development of Student's educational program. Respondents kept Mother apprised of Student's progress, involved her in the development of Student's IEP's, and addressed her concerns both at the meetings and in ongoing email exchanges. For these reasons, Student did not meet his burden of proof by a preponderance of the evidence on the issue of denying parental participation in the development of his IEP's.

ISSUE 4(A), (C), (D) AND (E): MAY 2016 IEP

39. Student contends he was denied a FAPE at the May 2016 IEP team meeting because Respondents failed to consider Dr. Passaro's independent educational evaluation and recommendations with an open mind. Student argues that Respondents' failure to change Student's eligibility, placement, and services to those preferred by Mother, shows Respondents failed to appropriately consider Dr. Passaro's recommendations and failed to offer an appropriate placement and services. Student also contends that Respondents misrepresented progress on writing goals. Lastly, Student argues Respondents failed to fully develop an IEP for Student because the May 10, 2016 meeting was an addendum and not a new annual IEP. Respondents contend they based placement, services, and goals in the May 2016 IEP on Dr. Passaro's report and input, and that the IEP meeting and resulting program met FAPE standards.

Legal Authority

40. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*See Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the

offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

41. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56031.)

42. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) "the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 ("*Rachel H.*") [adopting factors identified in *Daniel R.R. v. State Board of Educ.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].)

43. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) The methodology used to implement an IEP is left to the school district's discretion so long

as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (*See Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.)

44. The IDEA requires that parents periodically receive information regarding how their child is progressing on the annual goals stated in his IEP. (34 C.F.R. § 300.320.) An appropriate education under the IDEA need not be "the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the best choice." (*G.D. v. Westmoreland School Dist.* (1st Cir. 1999) 930 F.2d 942, 948 (italics in text).)

45. If the IEP team determines that a student needs a particular device or service, including an intervention, accommodation, or other program modification, in order for the student to receive a FAPE, the IEP team, "shall include a statement to that effect in the pupil's individualized education program." (Ed. Code, § 56341.1, subd. (c).)

46. If a parent obtains an independent educational evaluation at public expense, or shares with the school district an evaluation obtained at private expense, the results of the evaluation must be considered by the agency, if it meets agency criteria, in any decision made with respect to the provision of a FAPE. (34 C.F.R. § 300.502(c); Ed. Code §§ 56341, subd. (b)(1) and 56381, subd. (b).) The duty to consider the evaluation does not obligate the school district to accept the evaluation or its recommendations, or discuss the report at the IEP meeting. (*G.D. v. Westmoreland School Dist.* (1st Cir. 1991), 930 F.2d. 942, 947.)

Analysis and Conclusions

DR. PASSARO'S INDEPENDENT EVALUATION

47. Respondents, though not obligated to do so, incorporated most of Dr. Passaro's recommendations in Student's May 10, 2016 IEP. Dr. Passaro agreed with Respondent's offer of placement and services, as noted in paragraphs 35 through 38 of the Legal Conclusions. The team meeting involved a lengthy discussion of eligibility. Dr. Passaro's report focused on the effect of Student's attention deficits on his ability to perform in class. The assessment results mirrored Respondents' assessments in that, even though Dr. Passaro found a discrepancy between ability and achievement, Student functioned in the average range in written expression. The evidence did not show that a change in eligibility to specific learning disability, though preferred by Mother, would have been appropriate in light of Student's circumstances.

MISREPRESENTING PROGRESS ON GOALS

48. Respondents provided Mother with regular report cards and responded to her requests for information during and between IEP team meetings. Mother insisted that Respondents failed to provide educational records in response to her requests. This failure, she argued, prevented her from meaningfully participating in the development of Student's IEP because she did not have enough information to apprise her of Student's progress and needs.

49. Specifically, Mother disputed whether Student could write as much as Respondents reported, namely, a three-paragraph essay in one trial. But the dispute centered on the fact that Mother did not understand the length of a trial. She insisted that one trial meant in one sitting. But the evidence demonstrated that one trial consisted of a writing project that unfolded over time.

50. Despite the number of times Respondents explained the process of measuring Student's progress in writing, Mother continued to dispute their reports. There was no evidence that Respondents misrepresented progress on goals either directly or by failing to produce Student records. Further, Mother extensively discussed Student's progress and needs during the May 2016 IEP and the IEP team responsively considered her concerns. Student failed to demonstrate that Respondents misrepresented progress on goals and that Mother's participation in development of his IEP was in any way impeded.

OFFER OF PLACEMENT AND SERVICES

51. Student contends Respondents failed to offer appropriate placement and services in his May 10, 2016 IEP. However, Student failed to specify what services he should have been offered in order to receive a FAPE. Instead, Student simply insisted that he required placement at Child Development School, as the only placement that would provide him a FAPE.

52. The evidence showed that Student advanced through the general curriculum during the 2015 – 2016 school year, making anticipated progress, and advancing from grade to grade using supports and services in his general education setting. He worked on grade level standards, earning passing grades. Dr. Passaro agreed that offering general education placement with specialized academic instruction using a push-in model would constitute an appropriate placement in the least restrictive environment at the time of the May 2016 IEP.

53. Dr. Schuck opined that District's therapeutic behavior intervention class offered students the same type of program as Child Development School, except that it was on an open campus. During the May 2016 IEP team meeting, Respondents offered this placement as an alternative to the non-certified school preferred by Mother. Mother

never made an appointment to observe the school and insisted only on placement at Child Development School.

54. Where a child can access a general education environment with appropriate supports and services, it would be a denial of FAPE to offer placement on a closed campus in a small structured setting, without access to typically developing peers. Student failed to demonstrate that his May 10, 2016 IEP did not offer appropriate services or placement.

FULLY DEVELOPED IEP

55. Student contends that Respondents failed to fully develop an IEP for Student because the May 10, 2016 meeting was an addendum meeting and not an annual IEP. Student's contention lacks merit and was left unsupported by the evidence at hearing.

56. District scheduled the May IEP team meeting in response to Student's counsel's production of Dr. Passaro's report and request for a meeting to consider the report. Though Mother expressed confusion at hearing as to whether the meeting was an annual review, that confusion does not support a finding that Student did not have a fully developed offer of placement and services at the time of the May 10, 2016 offer. Student failed to meet his burden of proof on this issue.

ISSUE 5: FAILING TO IMPLEMENT MAY 2016 IEP

57. Student contends District failed to implement his May 2016 IEP between the time of her consent on May 16, 2016 and the end of the school year. Respondents contend that consent did not occur until June 13, 2016, after instructional services ended.

Legal Authority

58. When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822.) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE." (*Id.* at p. 821.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Id.* at p. 822.) The *Van Duyn* court emphasized that IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (*Ibid.*)

ANALYSIS AND CONCLUSIONS

59. Student contends that Respondents failed to implement his IEP between May 16, 2016 and June 13, 2016. Respondents credibly explained the administrative error, which resulted in not receiving consent to the IEP until June 13, 2016. But, even assuming the validity of Student's contention, Student produced no evidence demonstrating that the services he received during this brief time period fell significantly short of services required in his IEP.

60. Student missed approximately nine hours of specialized academic instruction as a result of Respondents' error. However, his report card shows that he continued to make progress and receive academic benefit in that he received passing grades, showed improvement in English language arts; writing, listening, and speaking; problem solving; and project management. Further, the evidence showed that the last

weeks of school contained seven shortened school days and various year-end student activities that limited instructional time, in any event.

61. Student failed to show that Respondents did not materially implement his IEP. Student presented no evidence of other services he believed he did not receive during the remaining few weeks of his school year. As a result, Student failed to meet his burden of proof by a preponderance of the evidence on this issue.

ISSUE 6: CLEAR OFFER OF PLACEMENT FOR THE 2016 – 2017 SCHOOL YEAR

62. Student contends that Respondents failed to make a clear written offer for the 2016 – 2017 school year such that, if Student changed districts, the new district could not understand and implement the IEP. The IEP, Student argues, does not state that he requires a specific assistive technology device, and particular software, to address his needs in writing. Respondents contend that Student's IEP provides enough specificity for a receiving district to implement Student's placement and services, as written.

Legal Authority

63. In *Union School District v. Smith* (1994) 15 F.3d 1519, cert. den., 513 U.S. 965, the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement to enable parents to evaluate whether to accept the placement and services offered.

Analysis and Conclusions

64. Student's May 10, 2016 IEP modified the January 6, 2016 IEP. The first page of the May 10, 2016 IEP clearly delineates each area of addition and change being made to the January 6, 2016 annual IEP. Any new school district picking up the IEP would be

able to understand which portions of the January IEP remain in effect, what new goals and services to implement, and Student's placement, services, and accommodations.

65. Further, the accommodation page delineates that Student be allowed to type writing assignments and use dictation. Student did not require specific hardware or software to meet his unique needs. The IEP offers occupational therapist consultation with teacher and staff regarding strategies for legibility and work modification.

66. During the hearing, Student did not elicit any evidence tending to show that the IEP could not be understood or was unclear. Mother disagreed with portions of the IEP and wrote to District describing her disagreement with eligibility, placement, some present levels of performance, and goals. This showed that she was able to understand the IEP, as written. Further, Student did not demonstrate that a receiving District could not identify Student's program and implement his May 10, 2016 IEP. Student failed to meet his burden of proof on this issue.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Respondents prevailed on all issues presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: July 12, 2017

/s/

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings